No. 14928.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK BENNY,

Appellant,

vs.

LOEW'S INCORPORATED, a corporation, and PATRICK HAMILTON,

Appellees.

COLUMBIA BROADCASTING SYSTEM, INC., and AMERICAN TOBACCO COMPANY,

Appellants,

vs.

LOEW'S INCORPORATED, a corporation, and PATRICK HAMILTON,

Appellees.

Appeals From the United States District Court for the Southern District of California, Central Division.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

I.

Appellees' Claim That a Parodist Has No Right of Fair Use Is Without Merit.

Throughout their brief, appellees reiterate in varying forms the question: "Why should the parodist, and only the parodist, stand in any better or different position before the law" than the serious dramatist or novelist whose use of copyrighted material would constitute infringement. (Appellees' Br. pp. 2, 3, 4, 34.) They argue that whenever one author has in any way used in his work more than an insubstantial proportion of the protectible mate-

rial contained in the work of another, there is actionable infringement wholly regardless of the purpose of such use, the manner in which the use is made, the necessity for the use in order to create a resultant new and totally different art form, or the extent to which the public interest would be injured were the use prohibited. The sole test, according to appellees, is whether the *amount* used would be considered "substantial" in the ordinary plagiarism case. Their position is clearly stated in their own words as follows:

> "Appellants have taken from the photoplay, not alone the general theme or idea, but the major sequences and details. . . . The parts so taken were substantial. . . . These principles make inescapable the conclusion that appellee's copyright was infringed by appellants. . . . The test of infringement *must in every case be the substantiality of the material taken,* not the mode or form in which the appropriations are used. . . . In other words, a parodized or burlesqued taking is treated no differently than any other appropriation." (Appellees' Br. pp. 8-15.)

And appellees flatly assert that the doctrine of fair use is not applicable to this case. (Appellees' Br. p. 15.)

The fact is, however, that the parodist does stand on a different footing from the serious dramatist or novelist. The unique requirements of the parodist's art confer on him the right to make a fair use of copyrighted material, and the interest of the general public in preserving this art form confers on it the right that such fair use be permitted. The failure to recognize these rights is the fundamental defect not only of appellees' brief but of the opinion below.

The doctrine of fair use is based squarely upon the constitutional mandate contained in Article I, Section 8, as uniformly construed by the courts. The copyright monopoly is granted solely to "promote the Progress of Science and the useful Arts," and "The primary object in conferring the monopoly lies in the general benefits derived by the public from the labors of authors." (*Fox Film v. Doyal,* 286 U. S. 123, 127.)* The doctrine of fair use exists as an integral part of the copyright law, because the public interest may demand, or even require, that certain uses be made of copyright materials, in which case the constitutional mandate would prevent the prohibition of such uses.**

Congress has not granted to authors the right to be free of "fair use" of their works; that is not one of the rights included in the copyright monopoly. When the statute grants a copyright to an author, it equivalently grants to the public at large the right to make such uses of that work as the public interest requires. As said by Ralph Shaw in his work, "Literary Property in the United States":

> "The differentiation between fair use and infringement is fundamentally a problem of balancing what the author must dedicate to society in return for his

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*Quoted in *United States v. Paramount Pictures Corp.,* 334 U. S. 131, 158, where the court says: "The copyright law, like the patent statutes makes reward to the owner a secondary consideration."

**Yankwich, "What is Fair Use?", 22 Univ. of Chicago L. Rev. 203 (1954); "Parody and Burlesque in the Law of Copyright", 33 Canadian Bar Rev. 1130, 1132 (1955). As Lord Ellenborough said in *Cary v. Kearsley,* 170 Eng. Rep. 679 (1802): "That part of the work of one author is found in another, is not of itself piracy or sufficient to support an action; a man may fairly adopt part of the work of another; *he may so make use of another's labours for the promotion of science and the benefit of the public.*"

> statutory copyright—which varies according to the nature of the works involved—against undue appropriation of what society has promised the author in terms of protection of his exclusive right to make merchandise of the product of his intellectual work. In its simplest terms, . . . fair use is all use dedicated to the public by the nature of statutory copyright. . . ." (P. 67.)

Because the basic tests of the extent to which use can be made of copyrighted material are founded upon the public interest, they must vary in relation to the varying factors which affect that interest. It follows that no artificial measurement of "substantiality" in the ordinary plagiarism sense can be applied as contended by appellees.

In the first place, their assertion that *any* "substantial" use is *ipso facto* an unfair use (Appellees' Br. pp. 18, 22) leaves no room for the doctrine at all. If the material used is in the public domain or is "insubstantial," then there is no limitation whatever upon its use by others and fair use is not involved. (Appellants' Br. p. 21, footnote.) The doctrine is only applicable where there has been a use of protectible material which would be substantial and an infringement except for the particular purpose or manner of use.

But, aside from that, the quantitative or qualitative measure of what is used is only *one* factor to be taken into consideration in weighing the primary demands of the public interest against the secondary object of protection to the author. In some instances the use of a comparatively minor though "substantial" part of the protectible material may be an infringement; in others, a very extensive use of such material will be fair. The difference in the result is not determined by either the amount

or the nature of the material taken; it is dependent upon the extent of the public interest in protecting or fostering the particular use which is made of that material.

Literary criticism is a case in point. For the purpose of criticism or review an author may give a full description of a copyrighted work, including its detailed story line or sequence of incidents, and make copious quotations therefrom. (Appellants' Br. pp. 24-25.) He may do so even though the criticism is wholly adverse, and thus one for which no consent could be "implied."* (*Hill v. Whalen,* 220 Fed. 359 (S. D. N. Y., 1914).) The reason for this extensive right of use is that literary criticism is an established art form which in the public interest ought to be protected and encouraged, and by the very nature of the form a critic ordinarily cannot perform his funtion in the way it ought to be performed without such use. Consequently, the law permits that use so long as it is within the limits of what is reasonably necessary to permit the critic to create his particular independent work.

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*A moment's reflection will dispel the appellees' notion (Appellees' Br. p. 18) that fair use is dependent upon the consent of the author or copyright proprietor. If that were so, then any author could prevent or limit any quotation or other use of his work for purposes of exemplification, criticism, review or otherwise, by a simple "notice of non-consent". But as Mr. Spring says in his book "Risks and Rights":

> "No copyright proprietor can destroy that right, or limit it *e.g.,* to a newspaper or periodical. Other book writers have the right of fair comment and criticism upon the ideas or literary merits of a copyrighted work, also the right to copy extracts thereof to buttress and illustrate or to corroborate that comment. And the use of quotations, to create background atmosphere or illustrate points, is a right of fair use that cannot be withheld by any copyright proprietor or publisher. . . . All the cases indicate that the definition of fair use and fair comment is for the court, *acting in the public's interest,* not for the publisher as the copyright proprietor." (P. 180.)

The same is true of the art form of parody and burlesque of particular works. Like literary criticism (and unlike any other art form of which we are aware) it is of its essential nature that it *must* make some use of a specific book, play, picture or other work of art.* Literary history shows that the more pointed and specific are the references to the "original," the more effective is the parody and the closer it approaches to the heights of great independent artistic creations. If, as we believe, the public interest is best served by the preservation of this ancient art form, the parodist must be allowed such use as will accomplish such preservation. Consequently, the test of infringement in this case cannot depend upon the establishment of any fine line between "substantiality" and "insubstantiality," in the plagiarism sense, or upon a strict qualitative or quantitative measurement of what is used. Rather, it must depend upon what is done with what is used—whether, on the one hand, the material is used only as the necessary ingredient for the independent creation of a bona fide parody or burlesque possessing the new and totally different literary characteristics of that

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*We have never contended, as appellees would have this court believe (Appellees' Br. pp. 36-38), that parody is entitled to use prior works because it is a branch of the art form of literary criticism. It is undeniable that most parodies are by their nature critiques of the works parodied as we pointed out (Appellants' Br. p. 14), but the two art forms are separate and distinct. However, there is a vital point of similarity in that both must make substantial use of prior works to live and flourish. Appellees apparently concede (though grudgingly) that right to criticism; parody is entitled to the same right for the same reason.

art form, or whether it is taken *animus furandi* for the purpose of reproducing the basic literary values of the original and thereby replacing that original before the public. As Judge Yankwich puts it:

> "The controlling question should be, not whether the parody or burlesque contains the skeleton or outline of the play or story it criticizes or ridicules, but whether it is true parody or a mere subterfuge for appropriating another person's intellectual creation. 'Fair use' thus becomes determinable in the light of all the valid judicially established criteria, including the result to be achieved, and in consonance with literary reality. For parody, under accepted definitions, is a type of composition which (1) seeks, in good faith, to criticize, caricature, mock, ridicule and distort the intellectual product of another, and (2) not to imitate or reproduce it as written, and (3) which, despite its own originality or merit, lacks the artistic and literary quality of the original. And, if a particular parody or burlesque achieves this, the fact that it is executed within the frame or around the outline of a serious work—the fact that there is (as there must be in any parody or burlesque) casual imitation—should not deprive it of standing as an independent literary or artistic creation in our courts. . . ." (Yankwich, "Parody and Burlesque in the Law of Copyright," 33 Canadian Bar Review 1130, 1152-1153.)

The fundamental difference between the art forms of the serious novelist and dramatist and the art form of the parodist which gives to the latter the right of fair use ordinarily denied to the former, lies in the fact that the art form of the parodist of the particular absolutely

requires the use of some other specific work of literature or art as its subject. Unless adequate use of that subject is made, there cannot be a parody of this type. Great novels or plays can be written without the slightest use of any other work; no parody of the particular can be. In the one case, public interest can be fully served by giving the copyright owner broad monopoly rights; in the case of parodies and of literary criticism, such interest can only be served by narrowing the monopoly scope sufficiently to permit the uses which are necessary to the existence of those useful arts.

Of course, the extent of the use is entitled to full consideration as one factor in determining the legitimacy of the result. There is bound to be a point at which the amount taken may be so great that the claim of burlesque or parody would become a subterfuge to disguise the reproduction of the substantial literary values of the original, untransmuted by creative literary effort. No public interest warrants such protection. But until such point is reached, we submit the parodist ought to have freedom to select those facets of the original which he desires to recall to his audience as the basis for exercising his own talent in this unique art form. The legitimate interests of authors and public alike will be irreparably harmed by the imposition of the strait jacket which appellees demand.

II.

Appellees' Claim That the Continued Exercise of the Parodist's Right of Fair Use Constitutes an Attempt to Change the Law Is Without Merit.

We believe this court will agree with the trial judge that this case is one of first impression.* It is not controlled by any breadth of general language in the Act, for such language is uniformly interpreted in the light of the constitutional purpose. (*Chamberlin v. Uris Sales Corp.,* 150 F. 2d 512 (2d Cir., 1945); *Martinetti v. Maguire,* 16 Fed. Cas. 920 (Cir. Ct. Cal., 1867).) The doctrine of fair use itself is not to be found in the language of the Act. It has been judicially declared as a necessary limitation of the copyright monopoly under the mandate of Article I, Section 8, of the Constitution.

Appellees argue (Resp. Br. 39) that custom cannot change the law. They thus industriously buffet a straw man. The issue is one of *interpreting* the law in the light of its necessary purpose "to promote Science and the useful Arts." The fact that both before and after the passage of this Act, and each Amendment thereto, the art of parody has continuously existed and flourished without challenge is potent evidence of the public interest in its

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*No purpose is to be served by further extended discussion of the English and American authorities analyzed at pages 35 to 43 of our opening brief. Appellees present no new cases. As we pointed out (Appellants' Br. pp. 40-41) the "mimicry" cases discussed by appellees (Appellees' Br. pp. 15-17) involved no literary parody or burlesque. The copyrighted work was there performed without change. They do illustrate, however, the extent to which courts have gone in permitting the use of "substantial" material even under such circumstances.

preservation. Examination of the examples and sources given in our opening brief at pages 14 to 21 will show the extensive use of otherwise protectible property in their creation.

None of the statutory revisions since 1790 purports to destroy or limit the legitimate right of parody. On the other hand, our courts have seldom, if ever, interpreted the Act to expand the copyright monopoly and to take away rights currently enjoyed by the public except when such a result was clearly intended. As appellees admit (Appellees' Br. p. 2), limitations on public rights to use literary material have resulted only from changes in the statute itself. In this case, as in those others, it is primarily for Congress to determine whether any such limitation is in the public interest.

III.

"Autolight" Is an Acknowledged Legitimate Parody or Burlesque, and Therefore Does Not Infringe "Gaslight."

The proper test of infringement in this case is, as we have shown, to determine whether the work in question used appellees' material only as the necessary ingredient for the independent creation of a bona fide parody or burlesque possessing the new and totally different literary characteristics of that art form, or whether such material was used *animus furandi* for the purpose of reproducing the basic literary values of the original and thereby replacing the original before the public. Since the court below erroneously failed to apply this test, its findings of

fact as to copying (Appellees' Br. p. 1) are not pertinent to the issue actually involved. Moreover, where, as here, the facts are not in dispute and the works involved are available for examination by the Court of Appeals, the findings below do not have the conclusive effect asserted (pp. 1, 8) by appellees. *Soy Food Mills v. Pillsbury Mills,* 161 F. 2d 22, 25 (7th Cir., 1947); cert. denied 332 U. S. 766 (1947).

There can be no doubt but that "Autolight" is a bona fide and legitimate parody or burlesque. Appellees made no attempt to prove that "Autolight" is a subterfuge. Indeed they apparently do not challenge its legitimacy.

As pointed out in our opening brief (pp. 43-46), "Autolight" was a new and independent literary work. Every element of "'Gaslight" used in "Autolight" was changed, inverted and transformed into a diametrically opposite set of literary values. Everything that was serious, tense and dramatic in the original became hilarious in the burlesque. The leading characters were mocked in an exaggerated and ludicrous fashion. This is the essence of parody and burlesque.

In burlesqueing "Gaslight," the authors of "Autolight" necessarily had to use recognizable elements of "Gaslight," for otherwise the burlesque had no point. They chose to use the basic plot and the outline of a few key incidents on which to focus their talents in this different field. But their use was no greater than was reasonably necessary to accomplish their proper purpose, and the few bare bones they used, they clothed with their own entirely

different literary treatment, expression and development. The resulting burlesque in no way supersedes or substitutes for the motion picture. It is, in short, only a fair use of the copyrighted material in "Gaslight."

The way to determine whether the television program "Autolight" is merely a depiction of the basic literary values of the motion picture "Gaslight," is to view each production as it appeared to its respective audience. Since both works are to be made available to the court for examination in that form, there is no necessity to comment at length on the distorted impression which may be conveyed by the appendices to appellees' brief. It is sufficient to point out that those appendices, bearing no real resemblance to the motion picture or television program, are typical of the kind of "analysis" by lineal dissection and rearrangement which has been uniformly condemned by the courts. (*Nichols v. Universal Pictures Corp.,* 45 F. 2d 119 (2d Cir., 1930); *Cain v. Universal Pictures Co.,* 47 F. Supp. 1013 (S. D. Cal., 1942); *Frankel v. Irwin,* 34 F. 2d 142, 144 (S. D. N. Y., 1918); and *Christie v. Harris,* 47 F. Supp. 39 (S. D. N. Y., 1942), aff'd 154 F. 2d 827 (2d Cir., 1946), cert. denied 329 U. S. 734 (1946).)

We think that consideration of the works as publicly presented will make it clear beyond doubt that "Autolight" and "Gaslight" are separate and independent creations, each having its own literary merit. "Gaslight" is a fine motion picture. "Autolight" is a bona fide parody, just as much as were the parodies of Fielding, Thackeray,

Burnand, Harte, Weber and Fields, and scores of others in the earlier days, and of Pain, Benchley, Thurber, Corey Ford, and the other great modern exponents of the art. If "Autolight" has no independent right to existence, then neither have the parodies of those famous and respected authors, and from this date a great literary tradition must vanish. We submit that American copyright law does not require that result.

Respectfully submitted,

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May, 1956.